that "under our Constitution courts of law alone are given power to try civilians," *id.* at 40.[7]

Two other decisions of this Court are relevant to the availability of habeas jurisdiction specifically for U.S. citizens abroad. Both involved detention based upon a relationship to international authority. In *Madsen v. Kinsella*, 343 U.S. 341 (1952), a U.S. civilian in U.S.-occupied Germany was convicted of murder by the "United States Court of the Allied High Commission for Germany," a court established by a law passed by the "Allied High Commission." *Id.* at 342-44 & n.3, 370-71. After being imprisoned in West Virginia, she petitioned the district court there for habeas corpus. *Id.* at 343, 345. On appeal, the Court exercised jurisdiction over her petition but denied the writ, finding on the merits that the military commission had the authority to try her. *Id.* at 362.

In *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam), the Court, without discussing jurisdiction, heard the merits of the habeas petition of a U.S. soldier whom the United States held in Japan pursuant to an indictment by a Japanese court charging that he had killed a Japanese civilian. *Id.* at 525-26. Under a treaty between the two nations,

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[7] While *Reid* held that a U.S. civilian could not constitutionally be tried by court-martial, a member of the U.S. military may be tried by court martial, regardless of whether the offense committed is connected to that member's service to the military. *See Solorio v. United States*, 483 U.S. 435, 436 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)).

the United States agreed to waive its jurisdiction to try Girard and deliver him "to the Japanese authorities for trial." *Id.* at 526-29. However, before the United States could deliver him, Girard filed for a writ with the D.C. district court. *Id.* at 526, 543. The Supreme Court granted certiorari and exercised jurisdiction to deny the writ on the merits, concluding that the treaty validly authorized Japan to exercise jurisdiction. *Id.* at 526-30.

C. From the 1960s to the Present

In 1973, in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), the Court revisited its construction of 28 U.S.C. § 2241 in *Ahrens* requiring the physical presence of a petitioner as a predicate to statutory jurisdiction. In *Braden*, a prisoner serving an unrelated sentence in an Alabama prison brought a habeas petition in Kentucky against a detainer issued by a Kentucky court. *Id.* at 485-87. The Supreme Court concluded that § 2241's provision for district courts to grant habeas writs "within their respective jurisdictions" need not be read, as it had been in *Ahrens*, to invariably require "the prisoner's presence within the territorial confines of the district . . . ." 410 U.S. at 495. Rather, jurisdiction was proper in the Kentucky district court because the writ of habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 494-95 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)).

In light of intervening congressional and jurisprudential developments, the *Braden* Court

concluded that traditional principles of venue would alleviate the forum-shopping concerns that animated the *Ahrens* decision and that the Court could "no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision." *Id.* at 499-500. Among the jurisprudential developments cited in *Braden* were the Court's decisions involving American habeas petitioners in custody outside of the United States (and the territory of any federal district court) where the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.* at 498 (citations omitted).

This Court's more recent decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), reaffirmed the "immediate custodian" rule of *Wales*, which interpreted the provisions of the habeas statute then applicable as contemplating "'a proceeding against some person who has the *immediate custody* of the party detained . . . .'" *Id.* at 435 (quoting *Wales*, 114 U.S. at 574). In particular, *Padilla* recognized that in "core challenges" to present, physical confinement (as distinct from the type of challenge at issue in *Braden*), a habeas petitioner must name his "immediate custodian"—and not some distant official or abstract entity—as his respondent. *Id.* at 436, 438-39. Nevertheless, the *Padilla* Court noted that jurisdiction for those outside the United States posed a different issue: "We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American

citizen is detained outside the territorial jurisdiction of any district court." *Id.* at 436 n.9.

In *Rasul v. Bush*, 542 U.S. 466 (2004), decided the same day as *Padilla*, the Court held that non-citizens detained by the U.S. military at the Guantánamo Bay Naval Base ("Guantánamo") in Cuba were able to invoke the statutory jurisdiction of the federal courts. *Id.* at 470-71, 485. The *Rasul* petitioners were foreign nationals captured abroad and held as "enemy combatants" by U.S. military forces at Guantánamo—"a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.* at 475 (footnote omitted). Because *Braden* "overruled the statutory predicate to *Eisentrager's* holding"—namely, the *Ahrens* Court's construction of the habeas statute—the Court reasoned that "*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims." *Id.* at 479 (footnote omitted). Further, the Court concluded that because the habeas statute does not distinguish between American citizens and foreign nationals held in federal custody and because the respondents in *Rasul* conceded that the habeas statute would create jurisdiction for the claims of an American citizen held at Guantánamo, "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481; *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006) (exercising the jurisdiction upheld in *Rasul* over petitions of non-citizens detained by U.S. forces in Guantánamo and holding, *inter alia*, that the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (the "DTA"), did not deprive

federal courts of jurisdiction to hear the previously pending habeas petition of a foreign national held as an "enemy combatant" at Guantánamo).

As efforts to combat terrorism and illegal immigration increasingly occupied Congress in the 1990s and following the events of September 11, 2001, the Court addressed several legislative amendments to the habeas statute, seeking to reconcile those amendments with the requirements of the Suspension Clause. For example, in the summer of 2001, the Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that neither the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, deprived federal courts of jurisdiction to review under § 2241 the habeas petition of a permanent resident alien challenging aspects of his removal proceedings. 533 U.S. at 293, 297, 314. The Court explained that the writ "has always been available to review the legality of Executive detention," *id.* at 305 (collecting cases), and habeas jurisdiction has been "regularly invoked on behalf of noncitizens, particularly in the immigration context," *id.* (citations omitted). The Court declined to construe the amendments as precluding habeas jurisdiction in possible contravention of the Suspension Clause, because doing so "would give rise to substantial constitutional questions." *Id.* at 300.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality), the Court considered the legality of the Government's detention of indefinite duration of a

U.S. citizen as an "enemy combatant," where the detainee had been seized abroad before being transferred to Guantánamo and then to a naval facility within the United States. *Id.* at 509-10. A majority of Justices agreed with the respondent that Congress had sanctioned the detention in question under 2001 legislation. *Id.* at 517 (plurality); *id.* at 587 (Thomas, J., dissenting). A different majority concluded that such authorization did not preclude judicial review of the detention. *Id.* at 536-37 (plurality); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). As Justice O'Connor stated, any threats to military operations posed by independent review did not trump "a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Id.* at 535 (plurality). Absent suspension of the habeas corpus writ, "a citizen detained as an enemy combatant is entitled to this process." *Id.* at 537 (plurality). While disagreement existed as to the appropriate scope and nature of any habeas review, it was thus undisputed by the parties—and by a majority of the Court—that the federal courts had jurisdiction to hear the habeas petition. *See id.* at 525 (plurality); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

II. This Court's Jurisprudence Identifies Key Factors That Affect the Availability of Habeas Corpus

Read together, the cases surveyed in Part I demonstrate that this Court has considered a variety of factors relevant in determining whether the writ

of habeas corpus and accompanying relief are available in specific cases of federal executive detention: (1) the status of the detainee (e.g., U.S. citizen or foreign national, civilian or enemy); (2) the location of the detention and of the custodian; (3) the source of the authority for detention (including the kind and nature of the tribunal, court or person authorizing detention); (4) the court in which the petitioner initiated the habeas petition; and (5) the statutory or constitutional jurisdictional predicates upon which the petitioner relied.

The Court has not focused on the same factors in every case nor always weighted all factors equally. Moreover, the Court has not addressed these factors using the same interpretive methodology in every case. At times, the decisions can be read to rely on textualism, whereas other decisions focus more on the common law history of the writ, its function as a structural restraint on the government's conduct, or the writ's fundamental purposes.[8] Taken as a whole, the Court's jurisprudence indicates that the Court has consistently relied upon the intersection of different factors, and not upon any one factor alone, in deciding whether to exercise its habeas jurisdiction in each case.

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[8] *See, e.g.*, William F. Duker, *A Constitutional History of Habeas Corpus* 225-86 (1980); Calabresi & Lawson, *supra* note 3, at 1003-09; Paust, *supra* note 5, at 19, 25; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 981-91 (1998).

A. Status of the Detainee in Correlation with Other Key Factors

A number of this Court's habeas decisions can best be understood in light of the interaction between the petitioner's citizenship status and the location of his or her detention. When petitioners are held within the territorial jurisdiction of the United States, the Court has exercised its habeas jurisdiction to review the detentions of both citizens and foreign nationals. *See Hamdi*, 542 U.S. at 525 (plurality); *see also, e.g.*, *St. Cyr*, 533 U.S. at 314; *Kaine*, 55 U.S. (14 How.) at 117 (plurality). However, some of this Court's post-World War II decisions indicate that when petitioners are detained abroad, the availability of habeas relief may be more expansive for Americans than for foreigners. *See, e.g.*, *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting) ("The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.").

Other decisions involved a confluence of factors including citizenship status, location, and the source of authority for detention. For example, in a number of cases in which citizens challenged confinement abroad, the Court reached the merits of their habeas petitions without questioning its own or the lower federal courts' jurisdiction to do so. This was so whether the challenged detentions were authorized by purely U.S. authority, *see Burns*, 346 U.S. at 138-39 (plurality), purely foreign authority,

see Wilson, 354 U.S. at 526-529, or by agreement with other nations, *see, e.g.*, *Reid*, 354 U.S. at 15 & n.29, 41 (plurality); *cf. Madsen*, 343 U.S. at 344 & n.3, 370-71.

In other cases, a different group of factors—citizenship status and the basis of jurisdiction invoked—was considered by the Court in determining whether to issue the writ. For example, when U.S. citizens have sought an original writ from this Court without previously filing in a lower court, the Court has declined to entertain their petitions. *See, e.g.*, *Bush*, 336 U.S. at 971 (denying leave to file an original petition); *Betz*, 329 U.S. at 672 (same).

The Court's case law is less clear about how citizenship status interacts with other factors when non-citizens are held outside the territorial United States. In *Hirota*, the petitioners were foreign nationals held in Japan and were sentenced by an international military tribunal; these were among the "foregoing circumstances" the Court enumerated before holding that "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed" on the petitioners. 338 U.S. at 198. In *Eisentrager*, which expressly precluded habeas corpus for enemy aliens convicted by military tribunals and detained overseas, the Court did not specify whether its holding rested on the petitioners' status as "enemy aliens," their extraterritorial situs, the statutory provisions involved or some combination of all three factors. *See* 339 U.S. at 777. More recently, however, a majority of this Court concluded in *Rasul* that § 2241 reaches even non-

citizens held outside the United States in an area over which the United States exercises plenary but not sovereign control, *see* 542 U.S. at 479.[9]

B. The Source of the Detention Authority

The nature of the authority behind a detention—be it Executive, judicial, military or otherwise—has proved to be an important factor in determining when habeas jurisdiction will be available.

1. Executive Detention Absent Judicial or Military Proceedings

This Court has recognized that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. In particular, the "'historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.'" *Rasul*, 542 U.S. at 474 (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring)). Thus, for instance,

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[9] Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, adds an express statutory limit to the habeas corpus jurisdiction of the United States in cases brought by certain non-citizens detained as "enemy combatants," or awaiting such determination. The constitutionality of this provision as applied to non-citizens held at Guantánamo is presently before this Court in *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007).

foreign nationals in *Rasul* and a U.S. citizen in *Hamdi* were detained without trial by the U.S. military and were permitted to invoke federal habeas jurisdiction to challenge their detention. *See Hamdi*, 542 U.S. at 509-11; *Rasul*, 542 U.S. at 470-71, 485.

2. Military Tribunals

By the close of the Civil War, it had become clear that the habeas writ could be used to challenge detentions pursuant to the convictions of military tribunals. *See, e.g.*, *Yerger*, 75 U.S. (8 Wall.) at 103; *Milligan*, 71 U.S. (4 Wall.) at 118. A military tribunal's jurisdiction and compliance with statutory procedures may be reviewed by the federal courts. *See, e.g.*, *Milligan*, 71 U.S. (4 Wall.) at 118-27; *see also Reid*, 354 U.S. at 40-41 (plurality); *Quirin*, 317 U.S. at 24-25. Further, convictions do not bar habeas jurisdiction; indeed, this Court has, on habeas review, granted post-conviction relief to American citizens convicted by U.S. military tribunals abroad on the ground that the proceedings before those tribunals were unconstitutional. *See Reid*, 354 U.S. at 3-5; *Toth*, 350 U.S. at 13-14 n.3, 23. Thus far, however, absent statutory authorization, military tribunals' judgments and sentences have not been susceptible to direct review. *See, e.g.*, *Burns*, 346 U.S. at 139-40 (plurality); *Yamashita*, 327 U.S. at 8-9; *Vallandigham*, 68 U.S. (1 Wall.) at 253; *Dynes*, 61 U.S. (20 How.) at 81.

3. Foreign Tribunals

While this Court has seldom grappled with the federal courts' authority to review decisions of foreign or international tribunals—either in advance of any actual proceedings or, less frequently, after decision—the Court has sometimes recognized limits on the challenges that may be presented to the proceedings of such courts. For example, this Court has held that where extradition is contemplated pursuant to a congressionally implemented treaty and unless the treaty provided otherwise, a petitioner (even one who is a U.S. citizen) could not challenge his surrender for trial under foreign law on the basis that the foreign proceedings will not guarantee him the same procedural protections as the Constitution. *Neely*, 180 U.S. at 123; *see also, e.g.*, *Wilson*, 354 U.S. at 529-30. *Neely*, however, indicates that there may be procedural requirements with which the foreign proceedings must comply in order for such a transfer to be validated. *See* 180 U.S. at 123. Given the development in due process decisions since that ruling, individuals detained in U.S. custody may be able to seek habeas review prior to their transfer to the custody of other nations where they could be subjected to grave forms of injury.

What this Court's decisions have established thus far is that a petitioner, whether or not a citizen, may use habeas to challenge the constitutional validity of the statutory scheme pursuant to which he is being transferred to foreign authorities, and to ensure that the transfer proceedings themselves and any U.S. detention prior to transfer are authorized

by statute. *See Kaine*, 55 U.S. (14 How.) at 103-04, 108-09 (plurality).

C. Statutory and Constitutional Predicates for Habeas Jurisdiction

In cases from *McCardle* and *Yerger* in the nineteenth century to *Rasul* in the twenty-first, this Court has consistently attended to the statutory predicate invoked and to the level of the court in which the habeas petition was first filed in determining whether it has jurisdiction. Successive congressional revisions have impacted these determinations. *Compare, e.g.*, *McCardle*, 74 U.S. (7 Wall.) at 508-14 (no jurisdiction for appeal of lower court's denial of habeas after repeal of 1867 statutory provision), *with Yerger*, 75 U.S. (8 Wall.) at 100-02 (jurisdiction under Judiciary Act for original habeas petition in Supreme Court seeking review of denial of habeas petition in lower court). The Court has not read a repeal of one form of statutory habeas jurisdiction to preclude another, absent a specific directive from Congress. *See, e.g.*, *St. Cyr*, 533 U.S. at 298-99 & n.10.

When petitioners have initiated habeas proceedings in this Court, the Court's construction of its own jurisdiction has also been an important factor. *Compare Bollman*, 8 U.S. (4 Cranch) at 100-01 (appellate jurisdiction for habeas review of lower court's order committing prisoner to jail), *with Vallandigham*, 68 U.S. (1 Wall.) at 251-54 (no jurisdiction, including through habeas, for review of

detention pursuant to military commission sentence on which no lower court had previously passed).[10]

III. Under This Court's Precedents, the Key Factors Barred Habeas Availability in *Hirota* and Require it for Omar and Munaf

The preceding overview shows *Hirota* to be but one of a series of cases that delineate the boundaries of habeas jurisdiction by reference to a combination of key factors. As the Court stated in *Hirota*, its judgment was predicated upon "the foregoing circumstances"; the Court did not indicate that any single factor was dispositive. The combination of these "circumstances" is thus critical to understanding the Court's conclusion that the federal courts had "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." 338 U.S. at 198.

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[10] Although this Court has only granted a handful of original habeas petitions since *Yerger* (and none since 1925), it has recognized the continuing availability of such an atypical procedure as recently as last Term. *See, e.g., Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (mem.) (Stevens & Kennedy, JJ., respecting the denial of certiorari) (noting the potential availability of original relief "[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, . . . or some other and ongoing injury" (citation omitted)), *reh'g granted, order vacated by* 127 S. Ct. 3078 (2007); *see also Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (mem.) (Kennedy, J., concurring in the denial of certiorari).

The first of the "circumstances" was that the *Hirota* petitioners were not American citizens but foreign nationals. The second was that they were not detained within the territories of the United States. While in and of itself being a foreign national does not prevent a petitioner from seeking a writ of habeas corpus, *see, e.g.*, *St. Cyr*, 533 U.S. at 26, the Court thus far has not permitted aliens held outside the United States or areas over which the United States has plenary control to seek habeas relief, at least when they have no connection to the United States, *see, e.g.*, *Eisentrager*, 339 U.S. at 777-81.

A third "circumstance" was that the *Hirota* petitioners sought to attack their convictions and sentences by an international military tribunal. *Hirota* thus fits within this Court's decisions holding that federal courts do not have habeas jurisdiction to review the judgment of a military tribunal so long as it is properly constituted and has adhered to appropriate procedural rules. *See, e.g.*, *Yamashita*, 327 U.S. at 5-9. Although these rulings involved U.S. military tribunals, their holdings indicate that a federal court would be no less reluctant to review the judgment of a duly constituted foreign or international military tribunal.

A fourth "circumstance" referred to in *Hirota* was that the petitioners filed for an original writ, and therefore were required to satisfy either the Court's original or appellate jurisdiction under Article III, section 2, clause 2. Petitions for original habeas writs were denied by the Court before and

after *Hirota* as a matter of course. *See, e.g.*, *Bush*, 336 U.S. 971 (mem.); *Betz*, 329 U.S. 672 (mem.).

In contrast, the circumstances of Omar and Munaf do not fall within the parameters of *Hirota*. They are instead consistent with cases where the Court has found that habeas jurisdiction exists.

First, Omar and Munaf are American citizens. Joint Appendix ("J.A.") 32, 110-11. The Supreme Court has never held that the federal courts lack jurisdiction to consider the claims presented in a habeas petition of a U.S. citizen detained abroad by the executive. To the contrary, since 1953, the Court has repeatedly approved of the exercise of jurisdiction over the habeas petitions of such Americans. *See, e.g.*, *Reid*, 354 U.S. at 3-4 (plurality); *Toth*, 350 U.S. at 23; *Burns*, 346 U.S. at 146 (plurality).

Second, Omar and Munaf are detained by U.S. forces that are working in conjunction with other nations as a part of the Multinational Force-Iraq ("MNF-I"), whose operations are authorized by a U.N. resolution. J.A. 42-43, 111. In other instances when U.S. citizens held by the U.S. military working with other nations or pursuant to international authority have filed habeas petitions, the Court has exercised jurisdiction to consider those petitions. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Third, Omar and Munaf filed their habeas petitions seeking review of their detention by U.S. forces prior to the judgment of any foreign tribunal. Both remain detained, although Munaf, after filing

for habeas relief, was tried, convicted and sentenced to death by an Iraqi court. *See* J.A. 14, 27-30, 33, 54, 88, 104-06, 111-12. Where, as here, the United States intends to transfer an individual in U.S. custody to a foreign sovereign, the Court's precedents indicate that the individual may properly invoke habeas jurisdiction to challenge that detention and the constitutional and statutory bases for the proposed transfer. *See, e.g.*, *Neely*, 180 U.S. at 123. Whether a foreign court has exercised process over the petitioner after the petition is filed is not relevant to the exercise of habeas jurisdiction. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Fourth, neither Omar nor Munaf seek an original writ from this Court; both have duly filed petitions in the D.C. district court, invoking that court's jurisdiction under § 2241. J.A. 27, 104. *Compare Hirota*, 338 U.S. at 198.

CONCLUSION

As set forth above, different combinations of key factors have been central to the Court's determinations concerning jurisdiction in habeas cases. Under the circumstances presented here, Omar and Munaf are among many other habeas petitioners whom this Court's rulings have recognized may invoke the jurisdiction of the federal

courts "to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305.

Respectfully submitted,

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